Local 1640, American Federation of State, County and Municipal Employees, AFL–CIO (Children's Home of Detroit) *and* Remonia Murphy. Case 7–CB–13986

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 5, 2005, Administrative Law Judge Joseph Gontram issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 1640, American Federation of State, County and Municipal Employees, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make Remonia Murphy whole for any increase in damages suffered as a consequence of the Respondent's failure to process her grievance, with interest."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT process or handle grievances of any member of the bargaining unit because of ill will or other invidious considerations toward such member.

WE WILL NOT arbitrarily process and handle grievances of any member of the bargaining unit.

WE WILL NOT fail to provide fair representation to any member of the bargaining unit.

WE WILL NOT in any like or related manner restrain or coerce members in the exercise of rights guaranteed them by Section 7 of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(b)(1)(A) by failing to process the grievance of Remonia Murphy, we do not rely on the statement made in the third paragraph of sec. III,A, of his decision that the circumstances behind Murphy's termination "suggest that the Respondent was, at least, partially responsible for Murphy's termination."

[2] In accordance with the decision in *Iron Workers Local 377 (California Iron Workers Employers Council)*, 326 NLRB 375 (1998), we shall modify the make-whole remedy set forth at sec. 2(a) of the judge's recommended Order by limiting the Respondent's liability to the portion of damages attributable to its failure to process Murphy's grievance.

Member Schaumber notes that the complaint also alleged the Employer, as a respondent, had the obligation, together with the Respondent Union, to make Murphy whole for her losses stemming from her termination. As explained in the judge's decision, the complaint against the Employer was settled. Therefore, the concerns raised by the dissent in *Iron Workers Local 377*, supra, are not implicated in this case.

WE WILL make Remonia Murphy whole for any increase in damages suffered as a consequence of the unlawful failure to process her termination grievance.

WE WILL, within 14 days from the date of this Order, remove from our files, and ask Children's Home of Detroit to remove from its files, any reference to the unlawful termination of Remonia Murphy's employment, and within 3 days thereafter notify Remonia Murphy in writing that this has been done and that her termination from employment will not be used against her in any way.

LOCAL 1640, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO

Patricia A. Fedewa, Esq., for the General Counsel.
Eric I. Frankie, Esq. (Miller Cohen, P.L.C.), of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case[1] was tried in Detroit, Michigan, on June 14–15, 2004. The charge was filed October 17, 2003,[2] and the complaint was issued December 31.[3] The complaint alleges that Local 1640, American Federation of State, County and Municipal Employees, AFL–CIO (the Union or the Respondent), violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by unlawfully failing and refusing to process the grievance of Remonia Murphy (the Charging Party) regarding the termination of her employment. The first question is whether the Respondent violated its duty of fair representation in connection with its processing of Murphy's termination grievance.

The employer, Children's Home of Detroit (CHD), settled with the General Counsel the unfair labor practice allegations against it in the present complaint. (GC Exh. 1(k).) If the Respondent presently were found to have violated its duty of fair representation in handling Murphy's termination grievance, it would be unable to obtain a resolution of the grievance. The Respondent failed to submit the grievance to arbitration, the time for submitting the matter to arbitration has expired, and CHD would not agree to litigate a matter it has already settled. Accordingly, the Respondent and the General Counsel agreed to litigate the merits of Murphy's grievance at the unfair labor practice proceeding, and that agreement was approved. See *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998). Thus, if the answer to the first question is affirmative, the second question is whether Murphy's grievance was meritorious.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The employer, Children's Home of Detroit (CHD), is a corporation that operates a youth mental health facility at 900 Cook Road, Grosse Pointe Woods, Michigan. During the calendar year ending December 31, 2002, CHD received gross revenues in excess of $250,000, and during that same period purchased materials valued in excess of $50,000 from points located outside the State of Michigan, and caused the materials to be delivered directly to its Grosse Pointe Woods facility. CHD has admitted and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent does not dispute that it is a labor organization. See also *Renaissance West Mental Health Center*, 276 NLRB 441, 442 (1985) (in which the Respondent was found to be a labor organization). The Respondent has a collective-bargaining agreement with CHD and it represents the employees in matters encompassing conditions of employment. Accordingly, I find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Remonia Murphy was an employee of CHD for more than 15 years, from January 6, 1988, until September 29, 2003. She started as an AM aide, and she advanced to the position of childcare worker II at the time her employment ended. There are 74 to 80 employees in the bargaining unit, and the bargaining unit includes employees in mental health facilities other than CHD. Murphy was a member of and held several positions in the Union during her employment at CHD. Murphy was a steward in 1999, she was elected the cochair of the unit in 2000, and she was elected to be the chairperson of the unit in an election scheduled for January 2001.

The collective-bargaining agreement provides that "[e]mployees in the unit shall be represented by the Unit Chairperson and one steward and one alternate steward." (GC Exh. 7, p. 9.) The agreement forbids discharges without just cause. Grievances are subject to a 4-step process, which, in summary, is as follows:

> Step 1. The employee reports the matter to his supervisor in the presence of the union steward, or the steward files the grievance on behalf of the employee, within 7 days.
>
> Step 2. If the matter is not settled, the steward submits the grievance to the Director of Residential Services within 5 days thereafter. The aggrieved employee must sign the grievance.
>
> Step 3. If the answer of the Director of Residential Services is unacceptable, the unit chairperson notifies the employer, and a meeting is held with representatives of the

[1] The transcript reflects the case number as Case 7–CA–46734. However, that case has been severed, and Case 7–CB–13986 is the only pending matter. The General Counsel has filed an unopposed motion to correct the transcript, and that motion is granted.

[2] All dates are in 2003 unless otherwise indicated.

[3] A charge was filed against the employer, Children's Home of Detroit, concurrent with the charge that was filed against the Respondent. The present consolidated complaint then issued. The charge against the employer was settled before the hearing.

union and the employer. The employer submits its answer to the grievance within 3 days thereafter.

Step 4. If the grievance is not resolved, the matter may be submitted to arbitration within 45 days of the employer's response in Step 3.

The January 2001 election for Local 1640 officers, although scheduled to take place in January, was held on at least three separate occasions. The election for president was not concluded until January 31, 2002; however, the election of Murphy as chairperson was completed approximately February 15, 2001. Arlean King was a candidate for president of the Local in this election, and Murphy was a candidate for chairperson of the unit. However, Murphy was running with and supporting a slate of candidates that was opposed to King and her slate of candidates. In the January 2001 election, Murphy supported John Swanson who ran against King for president of the Local. The rivalry and friction between King and Murphy during the January 2001 election campaign continued and worsened during and after the campaign. The following incidents are examples.

a. Verbal and physical confrontation. In approximately March 2001, while King and Murphy were at the Local's offices, King cursed at Murphy, physically threatened her, and grabbed her by the arm. The next day, Murphy went to the local police station and filed a complaint. As a result of that complaint, and after a hearing and an attempt at mediation, Judge Richard Halloran of the Third Judicial Circuit, Wayne County, Michigan, issued a personal protection order in favor of Murphy and against King. Judge Halloran's order, dated June 18, 2001, prohibited King from "stalking" Murphy for a period of 1 year.

The Respondent objected to the admission of evidence relating to the physical confrontation between King and Murphy on the ground that the confrontation occurred more than 2 years before the Respondent's alleged violation of its duty of fair representation as alleged in the complaint. However, the protection order was effective until June 2002, which was only 15 months before the Respondent's alleged violation. Moreover, since the evidence tends to prove a bad-faith motivation for the Respondent's actions and inactions regarding Murphy's termination grievance, the objection goes more to the weight of the evidence, rather than its admissibility.

The Respondent also objected to the evidence on the ground that its admission would force the Respondent to relitigate the state court proceeding. Without regard to the accuracy or relevance of this claim, the Respondent failed to present any evidence, including testimony from King, regarding the incident.[4] King was present at counsel's table throughout the hearing. Murphy's testimony is unrebutted and is credited.

b. Stipend and letter of complaint. The chairperson of the unit usually receives a stipend from Local 1640. However, King refused to approve a stipend for Murphy while she was the chairperson of the unit. On May 24, 2001, Murphy sent a letter to Albert Garrett, the president of Council 25 of AFSCME, in which she complained of King's refusal to provide Murphy with a stipend. Murphy also notified Garrett and explained to him her pursuit of a personal protection order against King.

c. Contract negotiations. The chairperson of the unit is a part of the Union's negotiating team for a collective-bargaining agreement with CHD. However, King bypassed Murphy in the negotiation of the agreement that was effective January 1, 2001. The agreement was resolved in a manner unknown to Murphy, and then given to Murphy to present to the members for ratification.

d. Term of office. The normal term of office for officers of the Union is 3 years. However, in January or April 2002, King appointed Zazal Jones to replace Murphy as the chairperson of the unit. This appointment supposedly was made after a new election called by King in January 2002. However, even Jones could not remember when the election was held. Moreover, at least some members of the unit were given no notice of the election, including Murphy, Melissa Baisch, Tasha Montgomery, and Shemika Boyd. Whether Jones was elected by some of the members or appointed by King, the fact remains that Murphy was replaced after serving only 1 year as chairperson of the unit.

e. Letters of complaint. On July 31, 2001, Murphy sent a letter to John Seferian, chair, judicial committee, AFSCME, in which she complained of King's actions against her, including King's verbal and physical confrontation with Murphy, King's influence in bringing charges against Murphy resulting in Murphy's suspension for 30 days from her position as chairperson, and King's call to the police to remove Murphy's supporters from a hearing on those charges. On April 18, 2002, Murphy sent another letter to Seferian protesting an election supposedly held on January 25, 2002, apparently referring to the replacement of Murphy by Jones. On November 18, 2002, Murphy sent a letter to Gerald McEntee, International president of AFSCME in which Murphy chronologically details several of her complaints against King. (GC Exh. 14.)

f. Offensive name calling. In late August or early September 2003, Tasha Montgomery, a childcare worker at CHD and a member of the Union, telephoned King regarding grievances that Montgomery wanted to file. King was belligerent during their brief conversation. King accused Montgomery of being "in cahoots with that bitch, Remonia Murphy." (Tr. 227.)[5] King then told Montgomery, "[O]ne B[itch] is already gone. The rest of you B[itche]s are going to be next." (Tr. 228.) Montgomery asked, but King did not tell her the person King had described as being already gone. King then hung up on Montgomery.

[4] I note that the Respondent's ability to present a defense could only be helped by being able to relitigate King's abusive and physical attack on Murphy because the State court proceeding was decided against King. Nevertheless, the Respondent failed to offer any evidence relating to the verbal and physical confrontation between King and Murphy.

[5] References to the transcript of the hearing are designated as Tr.

On September 13, Murphy filed three grievances against CHD through Lisa Grinston-Chapman,[6] the union steward. Grinston-Chapman had been installed as the union steward as one of the new union officers who were named when Jones replaced Murphy as chairperson. Murphy's grievances dealt with compensation for employees who elected not to receive health care coverage, violation of the collective-bargaining agreement (or contract) relating to health care coverage, and violation of the contract relating to layoff and recall procedures.

In approximately August, Murphy's mother became ill, and Murphy felt she should be with her. On August 29, Murphy submitted a request for leave under the Family Medical Leave Act, but by mid-September CHD had not provided her with a response. In mid-September, Murphy discussed her situation with her supervisor, Jaime Sampson, and Murphy mentioned the possibility of resigning. (Sampson was Murphy's acting supervisor in place of Cathy Anderson who was on medical leave.) Murphy told Sampson that she needed some time off, but Sampson replied that she should not resign. Nevertheless, Murphy typed a letter of resignation that she presented to Sampson on September 17. When Sampson received Murphy's resignation letter, she told Murphy to think about it, and not to rush into it. Murphy replied that for the next several days she was scheduled to be absent from work anyway because of scheduled oral surgery.

While Murphy was out of work because of oral surgery, she did think about it, and then changed her mind about, her resignation letter. On September 26, Murphy telephoned Sampson and Sampson told her to come right in. Murphy arrived at approximately 8 a.m. Murphy told Sampson that she had decided not to resign from her position, and she gave Sampson a handwritten letter confirming this. Sampson replied that she was glad Murphy had decided not to resign "because we really need you here." (Tr. 131.) Sampson then asked Murphy if she would stay and work that day even though it was not her scheduled workday. Murphy stayed and worked a full 8-hour shift.

On September 27, Anderson telephoned Murphy and thanked her for not resigning. Anderson told Murphy that she was an asset to the employer that Murphy was doing a great job, and that Anderson was happy and relieved Murphy had decided not to resign her position. Murphy continued to work full 8-hour shifts from September 26 through 29.

At the end of the workday on September 29, Sampson instructed Murphy to accompany her to Joseph LaFata's office. LaFata is CHD's director of residential services. (GC Exh. 1(i).) When Sampson and Murphy arrived in LaFata's office, LaFata and Zazal Jones were already there. LaFata told Murphy that CHD had decided against allowing her to withdraw her letter of resignation. He then said, "It's not me, Remonia. . . . I had nothing to do with this. This is not my decision." (Tr. 135, 137.) When Murphy asked LaFata for the name of the person who made the decision, he told her to talk to human resources. Although Jones was present throughout this meeting, she did not say anything nor did she speak with Murphy after the meeting. The next morning, Murphy came to CHD and spoke with Kurt Larkins, the director of the human resources department. She asked Larkins why she was not being allowed to withdraw her letter of resignation, but he did not give her an answer. Murphy then handed Larkins her keys and badge. Larkins, like LaFata, did not give any reason for CHD's actions.

The refusal of CHD to allow Murphy to withdraw her letter of resignation was contrary to its actions in previous cases. The collective-bargaining agreement provides that employees are expected to give CHD 2 weeks' notice in writing of their intent to resign. (GC Exh. 7, p. 21.) In the past, CHD has treated such written notices as conditional on the expiration of the full 2 weeks. That is, CHD treats the letters as notices of an intention to resign after the passage of 2 weeks, which is exactly what the letters are. Therefore, employees who have submitted 2-week notices have been permitted to withdraw such notices before the proposed resignation date. For example, in the summer of 2001, Melissa Baisch, a child-care worker and a member of the Union, submitted to LaFata a 2-week letter of her intent to resign. Between 1 and 2 weeks after she submitted that letter, Baisch changed her mind and told LaFata she had decided to remain with CHD. LaFata told Baisch that he was pleased she had changed her mind. He then handed Baisch's resignation letter back to her, and she destroyed it.

In 2000, Tasha Montgomery handed a 2-week resignation letter to her supervisor. Her supervisor later told Montgomery to think about it and returned the letter to Montgomery. Montgomery did think about it and she withdrew her letter. Montgomery notified her unit chairperson of her resignation letter before her supervisor returned her letter of resignation. In addition, Montgomery's coworker, Charles Brazil, told her that he had also submitted to CHD a 2-week letter of resignation that his supervisor allowed him to withdraw. The record fails to disclose any instance in which CHD refused to allow a worker to withdraw a 2-week letter of intent to resign, other than the case of Murphy in September 2003.

In spite of Sampson's support for Murphy's decision to revoke her resignation, Sampson's statement to Murphy that CHD really needed her, and Sampson's request to Murphy that she immediately work a shift even though she was not scheduled to work that day, Sampson later told Montgomery that management was quite pleased that Murphy was gone. Sampson also told Montgomery that LaFata was pleased Murphy had submitted a notice of resignation because Murphy was such a strong leader of the employees.

The day after Murphy's meeting with Larkins, she telephoned Grinston-Chapman and asked her to file a grievance on Murphy's behalf. Grinston-Chapman told Murphy that CHD had allowed other employees to withdraw their letters of resignation. Murphy said that she did not want Jones to handle her grievance at all because of Jones' failure to speak up during the meeting with LaFata. Grinston-Chapman said that she did not have any grievance forms. Murphy told her that Kimberly Grimes had grievance forms. Murphy requested Grinston-Chapman to contact Murphy after she filed the grievance.

[6] The witnesses generally referred to Grinston-Chapman as Lisa Chapman. However, the witness stated that she prefers the name Grinston-Chapman. Accordingly, that is the name used herein.

Grinston-Chapman spoke to Grimes and authorized her to file a grievance for Murphy on Grinston-Chapman's behalf.[7] Grimes is a child-care worker and is a member of the Union. Grimes was elected cochair of the unit in January 2001. However, she and Murphy were the subjects of Jones' letter seeking a new election of officers, and she was removed as cochair at the same time that Murphy was removed as the chairperson. On October 2, and in accordance with Grinston-Chapman's authorization, Grimes completed and submitted to LaFata a grievance regarding CHD's alleged wrongful termination of Murphy. (R. Exh. 1.)

Within approximately 2 weeks of the grievance, Grimes spoke to Jones who said that CHD was not going to do anything about the grievance because Murphy had quit. Grimes questioned this statement because Murphy had withdrawn her resignation letter, but Jones simply repeated CHD's position.

On October 14, Jones left a voice message on Murphy's home telephone stating that a meeting with CHD on Murphy's grievance was scheduled for Thursday, October 15, at 11 a.m. This message was incorrect, and it confused Murphy, because October 15 was a Wednesday. Moreover, the relationship between Murphy and Jones was acrimonious, and Murphy felt that the incorrect date or day that Jones gave in her voice message likely signified that the entire message was false. Murphy felt that Jones was "up to her games again." (Tr. 143.) Accordingly, Murphy called Sharon Donahue, the Respondent's representative in grievance meetings. Murphy asked Donahue if she was aware of a meeting scheduled for any time that week on Murphy's grievance. Donahue said that she was not aware of such a meeting. Indeed, Donahue said that she was not even aware of Murphy's grievance.

The next day, Murphy called Grinston-Chapman and asked her whether she knew of a meeting on Murphy's grievance. Grinston-Chapman said that she had heard nothing from CHD regarding the grievance, but that Jones had asked her why she had filed the grievance in the first place. Murphy then requested Grinston-Chapman to ask LaFata if there was a meeting. Murphy asked Grinston-Chapman to call Murphy as soon as she found out from LaFata the status of any meeting.

Grinston-Chapman's statement to Murphy on October 15 that she had heard nothing from CHD regarding Murphy's grievance was not true. On October 8, Grinston-Chapman received a memorandum from LaFata containing CHD's step-1 denial of Murphy's grievance. CHD denied the grievance because it claimed that Murphy was not terminated, but rather, she had resigned. After Grinston-Chapman received this response, she immediately turned it over to Jones. Grinston-Chapman's transfer of Murphy's grievance to Jones was contrary to Murphy's request that Jones not get involved in the grievance, and it was the first time that Grinston-Chapman turned over to the unit's chairperson a grievance response that had been given to her.

[7] Without regard to Grinston-Chapman's credibility, she did not deny authorizing Grimes to sign Murphy's grievance on behalf of Grinston-Chapman. Moreover, Grimes, a credible witness, testified that Grinston-Chapman gave this authorization.

In her demeanor and in her testimony, Grinston-Chapman was not a credible witness. She appeared to be troubled or uneasy throughout her testimony, which was given in the presence of King. Indeed, she often looked at King during her testimony. When Grinston-Chapman was asked, "Did Remonia ever contact you at any point directly to ask you to get involved in her grievance?" she responded, "I don't recall speaking to Remonia." (Tr. 358, 347–348, 364.) Such testimony is not credible. Murphy had an on-going hostile relationship with Jones, which was exacerbated by Jones' refusal to speak or intervene during LaFata's meeting with Murphy. Murphy would reasonably want Grinston-Chapman to handle her grievance rather than Jones, and Murphy testified that she did speak to Grinston-Chapman about her grievance. Moreover, Grinston-Chapman was the union steward who was responsible for handling grievances at the first step, so Murphy would likely have talked to her about the grievance. It is not credible that Grinston-Chapman did not talk to Murphy concerning the grievance, and it is not credible that Grinston-Chapman did not remember talking with Murphy about the grievance. Finally, and perhaps most disturbingly, Grinston-Chapman signed a false statement on October 27 saying that she had not received a response from CHD to Murphy's grievance. (GC Exh. 22.) For all of these reasons, Grinston-Chapman was not a credible witness.

As the union steward, Grinston-Chapman was responsible for the handling of grievances at the first step. She admitted that she interviewed no witnesses concerning that grievance. In addition, there is no evidence that the Respondent at any time interviewed any witnesses, including Murphy, looked at any documents, or did any investigation regarding the merits of Murphy's grievance.

It is unclear whether a meeting between the Respondent and CHD on Murphy's grievance was held. Grinston-Chapman testified that she went to a meeting with Jones, but she did not describe who, if anyone, was present at the meeting, the date or day the meeting was supposedly held, or what, if anything, occurred. Moreover, the meeting Grinston-Chapman referred to was scheduled to take place at 1 p.m., which was 2 hours later than the time of 11 a.m. that Jones gave in her voice mail message to Murphy. Grinston-Chapman did not advise Murphy of this meeting, assuming it occurred.

On October 16, Murphy again called Grinston-Chapman. Grinston-Chapman said that she went to LaFata's office, but he was not there. Grinston-Chapman repeated that she still had heard no response from CHD on Murphy's grievance, which, of course, was not true. Grinston-Chapman did not tell Murphy about any scheduled meeting on the grievance. The last time anyone from the Respondent contacted Murphy was October 14 when Jones left a voice mail message for Murphy. Other than a possible meeting on October 16, the record fails to disclose any further action taken by the Respondent or CHD on Murphy's grievance.

In October, Sampson told Baisch that CHD was pleased Murphy was gone because she had been such a strong, forceful person and leader of the employees. Murphy had been a "headache." In a different conversation involving LaFata, Sally Savage, the director of finances, and supervisor Rebecca Park-

inson, LaFata said that Murphy was terminated, and added, "Yeah, the mouth is gone now." (Tr. 65.)

III. ANALYSIS

A. Duty of Fair Representation

A union owes a duty of fair representation to all the employees it represents. *Vaca v. Sipes*, 386 U.S. 171 (1967). This duty extends to the union's enforcement of the collective-bargaining agreement, such as the filing and processing of grievances. A union breaches this duty and violates Section 8(b)(1)(A) of the Act when its conduct toward a member of the unit is arbitrary, discriminatory, or in bad faith. Id.; *Teamsters Local 553 (Miranda Fuel Co.*), 140 NLRB 181 (1962). When a union files a grievance on behalf of a member, "but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." *Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979).

There is substantial evidence of union hostility and animus toward Murphy. The hostility germinated in the political opposition of Murphy against King and Jones for union offices. The hostility is reflected in King's cursing at and physically threatening Murphy, Murphy's obtaining a State court, protection order against King, King's refusal to pay Murphy the stipend that had been paid to the former unit chairperson, King's refusal to include Murphy in the negotiations for the collective-bargaining agreement, Murphy's various complaints to higher union officials regarding King, Jones' replacement of Murphy as the unit chairperson, which was accomplished with King's assistance, King's calling Murphy a bitch within 2 months of Murphy's termination, and Jones' failure to say anything to Murphy or to LaFata during the meeting in which LaFata informed Murphy that her employment was terminated.

Indeed, when LaFata told Murphy her employment was terminated, he protested that "[i]t's not me, Remonia. . . I had nothing to do with this. This is not my decision." Jones was already in LaFata's office when Murphy arrived, and she said nothing to Murphy or to LaFata throughout the meeting. These circumstances suggest that the Respondent was, at least, partially responsible for Murphy's termination. Nevertheless, and without regard to the Respondent's responsibility for encouraging or obtaining Murphy's termination, there is ample evidence in this record of the Respondent's hostility towards Murphy.

The Respondent has offered no explanation for failing to process Murphy's grievance. (Although the Respondent did not prepare and file Murphy's grievance, it authorized Grimes to do so. The agreement does not prohibit such authorizations, and there is no evidence that CHD objected to this procedure.) The Respondent failed to investigate the grievance. The record fails to establish that a step-3 meeting was held on the grievance. Moreover, if a meeting were held, the Respondent failed to notify Murphy of the proper date and time of the meeting. "[T]he Union's duty of fair representation imposed on it the duty not to 'purposely keep [the grievant] uninformed or misinformed concerning' her grievance." *Auto Workers Local 417(Falcon Industries)*, 245 NLRB 527, 534 (1980), quoting *Groves-Granite*, 229 NLRB 56, 63 (1977). In addition, the Respondent failed to submit the grievance for arbitration as provided by step 4 of the grievance procedure.

The Respondent's failure to explain its actions in the handling of Murphy's grievance leaves its hostility toward Murphy as the unchallenged reason for such actions. The evidence compels the conclusion that the Respondent's failure to process Murphy's grievance—including the failure to accurately notify Murphy of the step-3 grievance meeting, the failure to present the merits of Murphy's grievance at a step-3 meeting, the failure to conduct any investigation of the merits of the grievance, and the failure to submit the grievance to arbitration—was in bad faith and was motivated by personal animus against Murphy emanating from Murphy's political opposition to the Local's leaders. See *Communications Workers Local 3410 (Bell-South Telecommunications)*, 328 NLRB 920 (1999) (the union violated its duty of fair representation when its actions in handling a grievance were motivated by the grievant's political activities in opposition to the union's leaders).

In addition, the Respondent handled Murphy's grievance in an arbitrary manner. As the Board stated in *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616, 618 (1975):

> [I]f a duty to avoid arbitrary conduct, as part of an affirmative, fiduciary responsibility, means anything, it must mean at least that there be a reason for action taken. Sometimes the reason will be apparent, sometimes not. When it is not the circumstances may be such that we will have no choice but to deem the conduct arbitrary if the union does not tell us what it is.

The Respondent proposes alternative reasons in its posthearing brief for its conduct (or lack of conduct) in processing Murphy's grievance. These reasons are considered below. However, there is no evidence from a union official or anyone else that such reasons actually motivated the Respondent in its processing of Murphy's grievance. Under the facts of this case, the reason for the Respondent's actions is not apparent, other than its personal hostility toward Murphy. Accordingly, and in the absence of an explanation from the Respondent for its actions, I conclude that the Respondent also acted arbitrarily in processing Murphy's grievance. See also *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 997 (1986) (the union abandoned the unit member's grievance, but offered no explanations for its actions; the Board held that the union's "continued nonaction, despite statements to the contrary, amounted to a willful failure to pursue the grievance, and was therefore perfunctory").

The Respondent argues that it did not pursue Murphy's grievance because CHD's rejection of Murphy's attempt to revoke her letter of resignation is not grievable. However, the collective-bargaining agreement does not exclude such a rejection by the employer from the grievance procedure. The Respondent also cites the agreement, article V, Grievance Procedure, page 14, which provides in part as follows:

> Nothing in this agreement is intended to limit the Employer's right to supervise and direct its work force, including the right to establish new jobs, increase or decrease the number of jobs, increase or decrease its services, change working methods,

> therapy programs, and schedules, hire, rehire, recall, transfer or layoff employees according to the Employer's needs and discharge employees for cause which includes, the inability of an employee to relate to children.

The Respondent argues that, pursuant to this provision, CHD's rejection of Murphy's attempt to revoke her letter of resignation is a matter committed to the discretion of management and, therefore, is not grievable. However, the foregoing provision specifically lists the matters committed to CHD's managerial discretion, but notably omits any reference to CHD's rejection of an employee's resignation letter. Under the maxim that the expression of some items in a list of related matters excludes items not mentioned ("*expressio unius est exclusio alterius*"), the cited provision of the agreement equally supports the conclusion that such an action by CHD is subject to the grievance process. Accordingly, I reject the contention that the agreement renders CHD's action not grievable.

I also reject a contention that the word "rehire" in the foregoing provision applies to Murphy's grievance or situation. Murphy's letter was a 2-week notification of an intention to resign. If she were allowed to revoke or withdraw the letter, CHD would simply destroy the letter or return it to her, as it has done with other employees in the past. CHD does not treat such a revocation as a rehire and it does not engage in any sort of formalized or other process to reinstate the employee. Employees who change their minds regarding these notices to resign simply stay on the job as they had always done.

The Respondent argues that Murphy's grievance was improper because neither Murphy nor Grinston-Chapman signed the grievance. However, both Murphy and Grinston-Chapman authorized Grimes to sign the grievance for them. Grinston-Chapman did not have grievance forms at the time Murphy's grievance was filed and she was not available to file it. Moreover, CHD did not raise the signatures on the grievance as an issue or defense in its response to the grievance.

The Respondent asserts that there is nothing in the agreement that requires CHD to allow an employee to withdraw a letter of resignation. However, this does not mean that CHD may, with impunity, do anything resulting in an employee's discharge that is not expressly forbidden in the agreement. In any event, the agreement does provide that an employee cannot be discharged except for just cause, and the immediate result of CHD's action was the termination of Murphy's employment. In the circumstances of this case, there is no practical difference between CHD's refusal to accept Murphy's withdrawal of her letter of resignation and CHD's discharge of Murphy. See, e.g., *Sycor, Inc*., 223 NLRB 1091 (1976) (the employer's refusal to accept the employee's rescission of her 2-week notice of resignation was treated as a discharge with all attendant remedies).

Moreover, CHD had established the practice of allowing employees to withdraw letters of resignation before the expiration of the 2-week notice in the letters, and there is no evidence in this record that CHD had ever before refused to do so. See also *Union de Obreros de Cemento Mezclado (Betteroads Asphalt)*, 336 NLRB 972, 973 (2001) ("The Union's interpretation of the contract provision becomes even less tenable in light of record evidence [of] the Employer's past practice."). CHD's previous practice also tends to prove that it treated Murphy differently from other, similarly situated employees. Such disparate treatment would tend to prove, in turn, that CHD did not have just cause in refusing to allow Murphy to withdraw her letter of resignation. In short, under the facts of this case, CHD's refusal to accept Murphy's withdrawal of her letter of resignation constituted a violation of the agreement and was grievable.

The Respondent relies on *Postal Workers (Postal Service)*, 327 NLRB 759 (1999), for the proposition that a union's decision against processing a grievance based on its belief that it could not represent a grievant who had resigned from employment does not violate the union's duty of fair representation to the grievant. *Postal Service* is inapposite. In that case, the union presented testimonial evidence, credited by the administrative law judge, of its good-faith belief that it could not represent the grievant because the grievant had resigned from his position. The judge concluded that the union "reasonably believed that it could not file a grievance on [the employee's] behalf." Id. at 767. In the present case, no such finding has been made, and the Union has not presented any evidence that it believed Murphy's alleged resignation prevented it from representing Murphy in the grievance. Nor has the Union presented any evidence of its good-faith belief in the propriety of its actions in handling Murphy's grievance. Moreover, a claim that the Respondent believed it could not represent Murphy would be contradicted by Grinston-Chapman's authorization for Grimes to file the grievance on behalf of Murphy.

The Respondent also points to an October 26 letter (R. Exh. 8) by Murphy to the General Counsel as proof that Murphy's only claim in the present case is against CHD. But this argument is misplaced and it does not prove enough. First, the General Counsel (as opposed to the charging party) brings complaints of unfair labor practices. Second, Murphy's letter states that her claim against CHD is based only ("solo") on CHD's retaliation against Murphy because Murphy had filed grievances against CHD. However, the letter does not expressly exclude Murphy's claim against the Respondent. Moreover, Murphy had already filed a charge against the Respondent when she wrote that letter, and the letter does not dispute or disavow that charge.

The Respondent argues that King and Jones are not alleged to have done anything wrong in the handling of Murphy's grievance. Even if this were true,[8] it is irrelevant. The complaint charges that the Union (not any particular individual) violated the Act by failing and refusing to process Murphy's grievance, and that this failure was due to unlawful and arbitrary reasons. Moreover, it is not so much what the Union did in the present case, but what it failed to do. A union may not refuse or fail to process a grievance "without reason, merely at the whim of someone exercising union authority." *Teamsters Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616, 617–

[8] Jones said nothing when LaFata informed Murphy, in effect, that he was not allowing her to withdraw her letter of resignation. In addition, Jones informed Murphy of the alleged meeting date by telling her the wrong day or the wrong date, as well as the wrong time. Thus, it cannot be said that Jones did nothing wrong.

618 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976), quoting *Griffin v. Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972). The Respondent failed to properly advise Murphy of an alleged step-3 meeting concerning her grievance, it failed to take part in a step-3 meeting (at least insofar as the record shows), it failed to perform any investigation of the merits of the grievance, and it failed to submit the grievance to arbitration. These failures were deliberate and were motivated by the Union's personal animosity against Murphy.

In short, the Respondent arbitrarily and in bad faith failed to process Murphy's grievance. The Respondent violated its duty of fair representation to Murphy. Accordingly, the Respondent violated Section 8(b)(1)(A) of the Act.

B. Merits of the Grievance

The parties agreed at the hearing to litigate the merits of Murphy's grievance in the present proceeding, and no objection was raised to this procedure in the parties' posthearing briefs. Accordingly, and after having determined that the Respondent violated Section 8(b)(1)(A) of the Act by failing to provide fair representation to Murphy in the handling of her grievance, the merits of that grievance will now be addressed. See *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998); *Rubber Workers Local 250 (Mack–Wayne)*, 290 NLRB 817 (1988).

The remedy for the Respondent's unfair labor practice depends on the merits of the grievance. Before the Respondent can be required to compensate Murphy for her losses resulting from the failure to process her grievance, the General Counsel must show that Murphy would have prevailed if the grievance had been properly processed. *Iron Workers Local 377*, supra at 377. The General Counsel must make this showing by a preponderance of the evidence. Id. at fn. 10. Insofar as the Respondent's unfair labor practice arises from its failure to submit Murphy's grievance to arbitration, the General Counsel's burden of proof follows the party having the burden of proof in the foregone arbitration. For example, if the employer would have had the burden of proving the propriety of its action, the General Counsel is required to show under that standard the arbitrator would have found in favor of Murphy. And, if the Respondent would have been required to prove that CHD's action was in violation of the agreement, the General Counsel is required to show that Murphy would have prevailed under that standard. Id. at 377. I need not resolve which party would have had the burden of proof in the foregone arbitration because under either standard Murphy would have prevailed.

As noted above, in cases previous to Murphy's, CHD treated employees' 2-week resignation letters not as actual resignations, but as conditional resignations, conditioned on the passage of the 2 weeks' advance notice.[9] The letters were treated as notices that at the end of the 2-week period, the employee would, at that time, resign. Accordingly, when such an employee changed her mind before the expiration of the 2-week period about her intent to resign, CHD simply returned the letter to the employee who then continued working as if nothing had occurred.

Indeed, this is exactly how CHD's supervisors treated Murphy. Nine days after Murphy submitted her notice of resignation, she telephoned her acting supervisor, Sampson. Sampson told Murphy to come immediately into work. After Murphy arrived, she told Sampson that she had changed her mind about resigning, and she gave Sampson a confirming handwritten letter. Sampson treated Murphy like CHD had treated other employees in similar situations. Moreover, she welcomed Murphy, told Murphy that she was needed in the job, and asked Murphy if she was available to work right away. In other words, Sampson did not attempt to reinstate or rehire Murphy or to institute such a process. She treated Murphy as if she had never resigned (which, in fact, Murphy had not), and she put Murphy to work right away. (Murphy had been out of work for several days before this because of a medical condition).

In addition, the next day, on September 27, Murphy's supervisor, Anderson, telephoned Murphy and thanked her for not resigning, showing that Anderson also did not consider that Murphy had resigned. Murphy continued to work regular shifts for 4 days, just as if nothing had happened, until LaFata, suddenly and without any warning, told Murphy that CHD had decided against allowing her to withdraw her letter of resignation. LaFata did not explain why CHD had taken this action, and neither did Larkins, CHD's director of human resources.

CHD had established a practice of allowing employees to withdraw letters of resignation within the 2-week period of the letters, and Murphy is the only employee who was not allowed to withdraw her letter of resignation. Moreover, although an unlawful motivation need not be shown in order to prove a violation of the agreement, the evidence establishes that CHD's motivation for its action was, at least in part, due to Murphy's strong and forceful advocacy on behalf of unit employees, activity which is protected by Section 7 of the Act.

If the Respondent had investigated Murphy's grievance and was armed with the evidence of CHD's past practice,[10] it could have convinced CHD in a step-3 meeting to grant Murphy's grievance. Moreover, the Respondent's position would have been strengthened at such a meeting with the evidence of CHD's unlawful motivation. If the Respondent were not successful at the third step, it should have submitted the grievance to arbitration, and it would have prevailed at the arbitration. I find that Murphy "'would have won on the merits' if the grievance had been 'properly pursued' by the Union." *Iron Workers Local 377*, supra at 380. Accordingly, I will order make-whole relief for Murphy.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

[9] There is no evidence that CHD took any action in reliance on Murphy's notice of resignation, such as advertising for the position or interviewing candidates. Accordingly, I need not and do not decide whether, under different circumstances, CHD would otherwise have been privileged to abandon or change its previous practice in the handling of notices of resignation.

[10] An investigation would, at least, have confirmed what the Respondent already knew. The Respondent's prior knowledge is demonstrated by Grinston-Chapman's statement to Murphy, on or about October 1, that CHD had allowed other employees to withdraw their letters of resignation.

2. By arbitrarily and in bad faith failing to process Murphy's grievance, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated its duty of fair representation in handling Murphy's termination grievance, and that the grievance was meritorious and would have prevailed if it had been handled properly, the Respondent is responsible for making Murphy whole for any loss of earnings and other benefits resulting from the violation of its duty. *Iron Workers Local 377 (Alamillo Steel Corp.)*, supra at 378. Such losses shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent's liability for backpay shall continue until Remonia Murphy obtains substantially equivalent employment to her employment at CHD.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Local 1640, American Federation of State, County and Municipal Employees, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Processing and handling grievances of any member of the bargaining unit because of ill will or other invidious considerations toward such member.

(b) Arbitrarily processing and handling grievances of any member of the bargaining unit.

(c) Failing to provide fair representation to any member of the bargaining unit.

(d) In any like or related manner restraining or coercing members in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Remonia Murphy whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files, and ask CHD to remove from its files, any reference to the unlawful termination of Remonia Murphy's employment, and within 3 days thereafter notify Remonia Murphy in writing that this has been done and that her termination from employment will not be used against her in any way.

(c) Within 14 days after service by the Region, post at its union office in Detroit, Michigan, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, deliver to the Regional Director for Region 7 signed copies of the notice in sufficient numbers to be posted by Children's Home of Detroit at its Grosse Pointe Woods, Michigan facility, in all places where notices to employees are customarily posted, if it is willing to do so.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 5, 2005.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT process or handle grievances of any member of the bargaining unit because of ill will or other invidious considerations toward such member.

WE WILL NOT arbitrarily process and handle grievances of any member of the bargaining unit.

WE WILL NOT fail to provide fair representation to any member of the bargaining unit.

WE WILL NOT in any like or related manner restrain or coerce members in the exercise of rights guaranteed them by Section 7 of the Act.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Remonia Murphy whole for any loss of earnings and other benefits suffered as a result of the unlawful processing and handling of her termination grievance.

WE WILL within 14 days from the date of this Order, remove from our files, and ask CHD to remove from its files, any reference to the unlawful termination of Remonia Murphy's employment, and within 3 days thereafter notify Remonia Murphy in writing that this has been done and that her termination from employment will not be used against her in any way.

LOCAL 1640, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO